Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO (Pittsburgh Des Moines Steel Company) *and* William James Butler. Case 20-CB-4879

August 4, 1981

DECISION AND ORDER

On August 15, 1980, Administrative Law Judge Harold A. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent did not violate Section 8(b)(1)(A) and (2) of the Act by failing and refusing to refer William James Butler to employment by Pittsburgh Des Moines Steel Company (PDM) at a jobsite located in North Valmy, Battle Mountain, Neveda (Valmy). For the following reasons, we disagree.

The pertinent facts are as follows: Stone & Webster Engineering Corporation was the general contractor for the construction of a power plant at Valmy. Prior to the commencement of construction, Stone & Webster, on behalf of itself and all subcontractors, negotiated and executed a multitrade, multiemployer collective-bargaining agreement entitled "Power Plant Project Agreement" with the Building and Construction Trades Council of Northern Nevada covering the work to be done at Valmy and limited by its terms to that particular jobsite. Respondent was among the 16 trade unions which were signatories to this agreement. Pursuant to the agreement, all ironworkers hired by the contractors and subcontractors on the Valmy project were to be obtained through Respondent's hiring hall. The Project Agreement did not contain a union-security clause.

Stone & Webster was also a signatory on other jobs to the "National Agreement" between the National Constructors Association and Respondent's International. This agreement contained, *inter alia*, a union-security clause requiring employees of signatory employers to become members on the eighth day of employment "in those states permitting union security." The National Agreement also provided, however, that any multitrade project agreement took precedence over its provisions. The Project Agreement for Valmy itself provided for incorporation of only those provisions of local or national bargaining agreements not inconsistent with its terms. According to Stone & Webster's resident manager, Cusick, the Project Agreement was incorporated in all contracts between Stone & Webster and its subcontractors, including its contract with PDM. Additionally, he testified that all subcontractors were required to become signatories to the National Agreement.

PDM was Stone & Webster's subcontractor for the structural steelwork at Valmy. Accordingly, PDM was required to obtain its ironworkers through Respondent's hiring hall. Although other subcontractors also utilized ironworkers, PDM had the greatest need for such employees and throughout the relevant period, May 29 to June 27, 1978, had a standing order with Respondent for ironworkers. Furthermore, PDM's job superintendent, Griffin, testified that PDM hired approximately 20 ironworkers between May 29 and June 30, 1978.[2] PDM, through its membership in the Western Steel Council, was also signatory to a local agreement between the California Ironworker Employers Council, Inc., and the District Council of Iron Workers of the State of California and Vicinity, with which Respondent was affiliated.

Sometime in 1977 Respondent initiated a supplemental dues program. Butler, a member of Respondent, refused either to sign a card authorizing the deduction of these dues or to pay them directly, and with members of other Ironworkers locals initiated court proceedings challenging the legality of the supplemental dues. In March 1978, despite his refusal to sign the authorization card, Respondent referred Butler to work with the Guy Atkinson Company at Diablo Canyon, California. Atkinson was a member of the National Constructors Association and a signatory to the National Agreement. Consequently, the union-security clause in the National Agreement applied to Butler while he was working for Atkinson. Late in January 1979, Butler's steward showed him letters from Respondent to Atkinson requesting his discharge for failure to pay the supplemental dues. Atkinson apparently did not comply with this request. On March 17, 1979, Atkinson terminated Butler, stating as a reason a "reduction in force." On or about March 19, Butler signed Respondent's out-of-work book and began reporting for possible dispatch each working day.

By late May, Butler was near the top of the out-of-work list. According to the uncontradicted testi-

[1] The Administrative Law Judge stated that grievances at the Valmy jobsite were handled in part by long-distance telephone calls to Sacramento or Utah. However, the record contains no evidence of calls to Utah for this purpose. This inadvertent error is insufficient to affect our decision.

[2] The General Counsel also placed in evidence some of Griffin's copies of Respondent's dispatch slips, which showed that at least six employees were referred to PDM for work at Valmy during the relevant period.

mony of Butler and Duff, another member of Respondent, on May 29, Respondent's business manager, Sturgis, announced at the hiring hall that three structural men were needed for the Valmy job. When Butler asked to be sent, Sturgis, in the presence of Duff, replied, "I am not going to dispatch you to the Valmy job or any other job until you pay your supplemental dues and sign the authorization card." Butler asked whether Sturgis would return Butler's check if he paid up his dues at that time and the court litigation subsequently was successful. Sturgis said he would not do so. The record shows that Respondent referred at least one ironworker to PDM on that day. Soon thereafter, on June 13, Sturgis told Butler, again in the presence of Duff, that Butler could go to work "when you pay."[3] The record again shows Respondent referred at least one ironworker to PDM that day. On June 27, Butler under protest paid the total amount of supplemental dues owed and was dispatched to a job to which he reported the next day.[4]

1. The Administrative Law Judge, in recommending dismissal of the amended complaint, found that counsel for the General Counsel disavowed the theory of a violation contained in the allegations of the amended complaint. In so doing, he noted that the amended complaint alleged that Respondent violated the Act by failing and refusing to refer Butler "because Butler failed to pay dues when he was under no obligation to do so." He further noted that counsel for the General Counsel not only stated at the hearing that this case did not turn on the legality of the supplemental dues, but also disavowed in her brief any contention that Butler was not delinquent in paying the supplemental dues or that the requirement to pay the supplemental dues was unlawful. He apparently construed these statements as a concession that Butler was obligated to pay the supplemental dues in order to be referred to work at Valmy. He further found that counsel for the General Counsel's primary theory, as expressed at the hearing and in her brief, that Butler was entitled at least to the 7-day grace period of Section 8(f)(2) of the Act before having to pay the supplemental dues because his dues delinquency occurred under a different collective-bargaining agreement covering a different bargaining unit from the agreement covering the Valmy project, was neither alleged in the complaint nor fully litigated during the hearing. Contrary to the Administrative Law Judge, we find that the General Counsel did not repudiate the theory of the amended complaint and that the General Counsel's primary theory was encompassed by the allegations of the amended complaint and was fully litigated.

As noted above, paragraph 6 of the amended complaint alleged that Respondent failed and refused to refer Butler to work at PDM "because Butler failed to pay dues when he was under no obligation to do so." Such an allegation clearly raised the question of whether Butler had an obligation to pay dues in order to gain a referral to work for PDM at Valmy. Contrary to the Administrative Law Judge, that allegation put in issue not whether Butler was ultimately obligated to pay such dues, but rather whether the manner in which Respondent attempted to enforce that obligation was lawful. Accordingly, counsel for the General Counsel's "concession" that Butler may have had an obligation to pay his dues arrearages at some time could not reasonably be considered a repudiation of the amended complaint's allegation that the refusal to refer Butler was unlawful. Secondly, prior to calling any witness at the hearing, counsel for the General Counsel stated that Butler had previously worked for Atkinson and had failed to pay his supplemental dues. She then explained that she had two theories for finding that Respondent violated the Act:

> One, he was refused dispatch specifically to a job in Valmy which was bound by a different collective bargaining agreement. The second theory is that even if it had been the same bargaining agreement the job was in Nevada and, therefore, under the right to work rules of Nevada the Union violated the Act by refusing to dispatch him to a job site in Nevada.

In support of these theories, counsel for the General Counsel then introduced documentary evidence, including the Project Agreement, the National Agreement, and the Nevada right-to-work law,[5] and called witnesses. In so doing, she developed the history of Butler's employment with Atkinson as part of her effort to show that the employment under which Butler accumulated his dues arrearages involved a collective-bargaining agreement and a bargaining unit different from those involved

[3] Although Butler testified that this conversation occurred in the first part of June, Duff testified without contradiction that it occurred on June 13.

[4] The Administrative Law Judge stated that after paying his supplemental dues on June 27 Butler went to work that day at the Valmy project. However, the record shows that he went to work the next day at an undisclosed location.

[5] Nev. Rev. Stat. §613.250 (1973) provides:

> No person shall be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization, or shall the state, or any subdivisionthereof or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment because of nonmembership in a labor organization.

at Valmy. Finally, her brief to the Administrative Law Judge set forth her theories in detail. Thus, it is clear that the theories advanced by counsel for the General Counsel at the hearing were in no way at variance with the allegations of the complaint, that she fully articulated the theories on which she was relying, and that the evidence as developed at the hearing clearly put Respondent on notice as to what the basis of the alleged violation was. Accordingly, we conclude that the requirements of due process have been satisfied here and that the General Counsel's theories for finding a violation of the Act are properly before the Board.

2. Turning to the merits, we conclude that the General Counsel has established that Respondent violated the Act, as alleged. Initially, we find the General Counsel has established that Butler in fact was denied referral to work for PDM at Valmy and that Respondent did so because of his failure to pay his supplemental dues. Thus, Butler's uncontradicted testimony establishes that he was near the top of the out-of-work list by May 29, and, according to the uncontradicted testimony of both Butler and Duff, Sturgis on May 29 told Butler he was not going to dispatch him "to the *Valmy job* or any other job" until he paid his dues (emphasis supplied). Thereafter, on June 13, Sturgis again told Butler he would not refer him to work until he paid his dues. Significantly, Sturgis never mentioned a lack of jobs as the reason for not referring Butler and, once Butler paid the supplemental dues, Sturgis immediately referred Butler to a job. Furthermore, as previously noted, on May 29 Sturgis announced that he needed structural men for Valmy, the type of work performed by PDM; PDM had a standing order for ironworkers and hired approximately 20 such employees between May 29 and June 30; and Respondent referred at least one ironworker to work for PDM at Valmy on both May 29 and June 13. Despite such evidence, Respondent offered nothing in rebuttal. Accordingly, we conclude that Respondent failed and refused to refer Butler to employment at PDM's Valmy jobsite on May 29 and June 13, 1978, and that it did so solely because of his failure to pay the supplemental dues.

We also find, in the circumstances of this case, that this failure and refusal to refer Butler was unlawful. Thus, it is well settled that a union lawfully may seek the discharge of an employee whose dues are in arrears if it has a valid union-security clause in its collective-bargaining agreement with the employer. *The Radio Officers' Union of the Commercial Telegraphers Union, A.F.L.* [*Bull Steamship Co.*] v. *N.L.R.B.*, 347 U.S. 17, 40–41 (1954). Furthermore, a valid union-security clause can be enforced at the hiring hall level by a refusal to refer an employee whose dues are in arrears, so long as the employee has already worked for the statutory grace period in the bargaining unit to which the collective-bargaining agreement containing the union-security clause applies. *Mayfair Coat & Suit Co.*, 140 NLRB 1333 (1963). However, the Board has held that amember who has become delinquent in dues under a contract covering one bargaining unit cannot be denied employment under a contract covering a separate bargaining unit without affording him the statutory grace period in which to become current in his or her dues. *Millwright and Machinery Erectors Local Union No. 740, District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Tallman Constructors, a Joint Venuture)*, 238 NLRB 159 (1978); *William Blackwell, d/b/a Carolina Drywall Company*, 204 NLRB 1091 (1973).

In the present case, Butler became delinquent in dues while employed by Atkinson. Respondent lawfully could have refused to refer him to subsequent employment by Atkinson or other employers who were members of the multiemployer bargaining unit covered by the National Agreement. However, the General Counsel argues, and we agree, that the employers and employees on the Valmy project constituted a bargaining unit separate from that in which Butler worked at Atkinson and were covered by a collective-bargaining agreement different from that which covered the work he performed for Atkinson. Thus, as noted above, the Project Agreement was negotiated by Stone & Webster on behalf of itself and all other subcontractors on the project, was signed by the Building and Construction Trades Council of Northern Nevada and 16 individual trade unions, and was limited by its terms to the Valmy project. Although the Project Agreement incorporated the terms of the National Agreement and of any local agreement to which the parties might already be bound, such incorporation was limited to those terms not inconsistent with the Project Agreement. Furthermore, the National Agreement specifically states that multi-trade project agreements take precedence over it.[6] Therefore, it is clear that the work at Valmy and the work for Atkinson involved two different bargaining units under two different collective-bargaining agreements.

[6] Although all subcontractors, including PDM, were required to sign the National Agreement, merely signing that preexisting agreement did not make them part of the multiemployer unit created by it since there must be an unequivocal intention on the part of the employer to be bound by group, rather than individual, action. *Schaetzel Trucking, Inc.*, 250 NLRB 321 (1980); *New York Typographical Union 6 (Royal Composing Room, Inc., et al.)*, 242 NLRB 378 (1979). There is no evidence of such an intention here.

Accordingly, Butler, who had not previously worked at Valmy and consequently could not be delinquent in any dues obligations accrued while working in that bargaining unit, could not be required to pay his dues arrearages accrued while working for Atkinson as a condition for referral to work for PDM at Valmy. See *Tallman Constructors, supra*. Rather, his rights were those of a new employee entitled to work for the 7-day statutory grace period of Section 8(f)(2) of the Act before a valid union-security clause could be invoked against him because of his dues arrearages.[7] Accordingly, we find that Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing and refusing to refer Butler to employment by PDM at Valmy on May 29 and June 13, 1978.[8]

3. As noted above, according to the uncontroverted testimony of Butler and Duff, on May 29 Business Agent Sturgis stated that he would not refer Butler to work at Valmy until he paid his supplemental dues. We find that Sturgis' statement constituted an unlawful threat in violation of Section 8(b)(1)(A) of the Act. In so doing, we note that, although this conduct was not specifically alleged as a violation in the amended complaint, the issue was fully litigated and is intimately related to the subject matter of the amended complaint.[9]

CONCLUSIONS OF LAW

1. Respondent Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Stone & Webster Engineering Corporation and Pittsburgh Des Moines Steel Company are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By failing and refusing to refer William James Butler to work assigments at Pittsburgh Des Moines Steel Company at North Valmy, Battle Mountain, Nevada, on May 29 and June 13, 1979, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

4. By telling William James Butler it would not refer him to work assignments at Pittsburgh Des Moines Steel Company at North Valmy, Battle Mountain, Nevada, on May 29, 1979, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment, Respondent has violated Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that Respondent failed and refused to refer William James Butler to employment by Pittsburgh Des Moines Steel Company at North Valmy, Battle Mountain, Nevada, in violation of Section 8(b)(1)(A) and (2) of the Act. In our recent decision in *Sheet Metal Workers' Union Local 355, Sheet Metal Workers' International Association, AFL-CIO (Zinsco Electric Products)*, 254 NLRB 773 (1981), we held that in cases where a union unlawfully causes an employer to discharge an employee for not complying with the union-security provisions of their collective-bargaining agreement in violation of Section 8(b)(1)(A) and (2) of the Act, and there is no culpability on the part of the employer, we would no longer apply the remedy established in *Pen and Pencil Workers Union, Local 19593, AFL (Parker Pen Company)*, 91 NLRB 883 (1950), of tolling the union's backpay liability 5 days after it notifies both the employer and the employee that it no longer objects to the employee's reinstatement. Rather, we held that, in order to insure the proper and effective realization of the statutory policy which requires that a transgressor bear the burden of the consequences stemming from its illegal acts, we would require the union in such cases to make the employee whole for all losses of wages and benefits suffered as a result of the union's discrimination until the employee is either reinstated by the employer to his or her former or substantially equivalent position or until

[7] With respect to our make-whole remedy, we note that, if Butler had been properly referred to work for PDM at Valmy, Respondent lawfully could not have demanded his discharge for failure to pay his dues even after expiration of the 7-day grace period. Thus, in light of Nevada's right-to-work law, any union-security clause which might arguably be a part of the Project Agreement by incorporation of the National Agreement or a local agreement could not validly have been invoked to cause the discharge of an employee already working at Valmy.

[8] Since we have found that the work at Valmy and the work for Atkinson involved two different bargaining units, we find it unnecessary to pass on the General Counsel's alternative theory that, even if the employer and employees on the Valmy project were part of the same bargaining unit as that in which Butler accumulated his dues arrearages, Respondent's refusal to refer Butler to work for PDM at Valmy was unlawful because of Nevada's right-to-work law. Hence, we do not pass on the Administrative Law Judge's conclusion that, because the actual refusal to refer took place in California, which is not a right-to-work State, rather than in Nevada, the General Counsel's alternative theory is precluded by the opinion of the Supreme Court in *Oil, Chemical & Atomic Workers International Union, AFL-CIO, et al. v. Mobil Oil Corp., Marine Transportation Department, Gulf-East Coast Operations*, 246 U.S. 407 (1976).

[9] See, generally, *Crown Zellerbach Corporation*, 225 NLRB 911, 912 (1976).

the employee obtains substantially equivalent employment elsewhere.

It is our opinion that the same rationale applied in *Zinsco* in determining the appropriate remedy in discharge cases is also applicable to the related area of cases involving, as here, a union's refusal to refer an employee to employment in violation of Section 8(b)(1)(A) and (2) of the Act and no finding of culpability on the part of the employer.[10] Accordingly, consistent with the remedy in *Zinsco*, we shall order Respondent to notify Pittsburgh Des Moines Steel Company, in writing, with copies furnished Butler, that it has no objection to his hiring or employment. We shall further order Respondent affirmatively to request Pittsburgh Des Moines Steel Company to hire Butler for the employment which he would have had were it not for Respondent's unlawful conduct, or for substantially equivalent employment.[11] Finally, we shall order Respondent to make Butler whole for any loss of pay or other benefits he may have suffered by reason of the discrimination against him from the date of Respondent's unlawful conduct until he obtains the employment which he would have had were it not for Respondent's unlawful conduct, substantially equivalent employment with Pittsburgh Des Moines Steel Company, or substantially equivalent employment elsewhere.[12] Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[13]

[10] In so doing, we note that, although in the past the Board in 8(b)(1)(A) and (2) refusal-to-refer cases generally tolled the union's backpay liability 5 days after it notified the employer and discriminatee that it had no objection to the discriminatee's employment, it did so in reliance on that part of *Pen and Pencil Workers* which was overruled in *Zinsco*. See *International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 7, AFL (Seattle Construction Council)*, 92 NLRB 753, 754, and fn. 2 (1950).

[11] In *Zinsco*, in accordance with our usual practice in 8(b)(1)(A) and (2) cases involving a discharge, we required the respondent union affirmatively to request the employer to reinstate the discriminatee. The Board in 8(b)(1)(A) and (2) cases involving a refusal to refer to a specific employer generally has not required a union affirmatively to request the employer to hire the discriminatee. However, such a remedy has been applied in cases involving situations similar to a refusal to refer. See, e.g., *International Longshoremen's and Warehousemen's Union, Local 10, ILWU (Pacific Maritime Association)*, 102 NLRB 907 (1953); *Newspaper and Mail Deliverers' Union of New York and Vicinity (The New York Times Company, Inc., and The Hearst Corporation, New York Mirror Department)*, 101 NLRB 589 (1952); *Newspaper and Mail Deliverers' Union of New York and Vicinity (New York Herald Tribune, Inc.)*, 93 NLRB 419 (1951). Furthermore, the considerations underlying the application of this type of remedy in an 8(b)(1)(A) and (2) discharge case equally apply to an 8(b)(1)(A) and (2) refusal-to-refer case, and we find that it will best effectuate the purposes of the Act to require a respondent union in the latter type of cases affirmatively to request the employer to hire the discriminatee.

[12] We recognize that, because of the nature of referral cases, the facts of a particular case may present issues concerning the proper application of the remedy adopted herein. The resolution of such issues may appropriately be left to the compliance stage of our proceedings.

[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO, Sacramento, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing and refusing to refer William James Butler to work assignments at Pittsburgh Des Moines Steel Company at North Valmy, Battle Mountain, Nevada, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment, and from telling Butler it is refusing to refer him for this reason.

(b) In any like or related manner restraining or coercing members or applicants for referral in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Notify Pittsburgh Des Moines Steel Company, in writing, with copies furnished to William James Butler, that it has no objection to the hiring or employment of Butler, and request Pittsburgh Des Moines Steel Company to hire Butler for the employment which he would have had were it not for Respondent's unlawful conduct, or for substantially equivalent employment.

(b) Make whole William James Butler for any loss of pay or other benefits he may have suffered by reason of the discrimination against him in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(c) Post at all places where notices to applicants for referral and members are posted copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail and refuse to refer William James Butler to work assignments at Pittsburgh Des Moines Steel Company at North Valmy, Battle Mountain, Nevada, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment, or tell him we are refusing to refer him for this reason.

WE WILL NOT in any like or related manner restrain or coerce members or applicants for referral in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

We will notify Pittsburgh Des Moines Steel Company and the above-named individual, in writing, that we have no objection to his hiring or employment, and WE WILL request Pittsburgh Des Moines Steel Company to hire him for the employment which he would have had were it not for our unlawful conduct, or for substantially equivalent employment.

WE WILL make the above-named individual whole for any loss of pay or other benefits suffered by reason of the discrimination against him, plus interest.

IRON WORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE AND STRUCTURAL IRONWORKERS, AFL-CIO

DECISION

HAROLD A. KENNEDY, Administrative Law Judge: The Respondent herein, Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO, is charged with violating Section 8(b)(1)(A) and Section 8(b)(2) of the National Labor Relations Act[1] by failing or refusing to refer William James Butler on or about May 29 or June 13, 1972,[2] to employment at a jobsite located in North Valmy, Battle Mountain, Nevada. Butler, the Charging Party, filed a charge with the Regional Director of the Board for 20 Region on May 30. The amended complaint, issued on November 7,[3] alleges that Respondent's business manager-dispatcher, Maxi Sturgis, failed or refused to refer Butler because Butler failed to pay dues when he was under no obligation to do so. According to the complaint, such conduct restrained and coerced employees in the exercise of the right guaranteed them by Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act and also caused or attempted to cause employers to discriminate against employees in violation of Section 8(b)(2) of the Act. The case was heard in Sacramento, California, on December 10.[4]

Jurisdiction and a number of other matters are admitted and are not in dispute.[5]

The complaint asserts jurisdiction on the basis that Stone & Webster Engineering Corporation of Boston, Massachusetts, is engaged as a general contractor in the construction of a power plant at Valmy; that it had purchased and received from points outside Nevada goods and materials valued in excess of $50,000; and that Stone & Webster as agent on its own behalf and on behalf of contractors and/or subcontractors was a party to a collective-bargaining agreement with "the Building and Construction Trades Council of Northern Nevada and each of the labor organizations individually signatory to that collective-bargaining agreement."[6] Among the employers at the Valmy jobsite, in addition to General Contractor Stone & Webster, was Pittsburgh Des Moines Steel Company (PDM), which has an office in Pittsburgh and other facilities in various States, including Nevada.[7]

Respondent is admittedly a labor organization within the meaning of Section 2(5) of the Act.

Maxi Sturgis, at all times material, has been an agent of Respondent within the meaning of Section 2(13) of the Act.

Robert L. Cusick testified that he is the resident manager and senior official at the Valmy project for Stone & Webster. The Valmy project, he explained, involves the construction of a fossil fuel plant for the Sierra Pacific

[1] Sec. 8(b) provides, in pertinent part, that it shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

[2] All dates used herein refer to 1979 unless otherwise indicated.

[3] The original complaint issued on July 9.

[4] Certain errors in the transcript have been noted and are hereby corrected.

[5] Initially Respondent denied jurisdiction but concedes in its brief that jurisdiction does exist.

[6] The resident manager at Valmy for Stone & Webster estimated the value of materials used in the Valmy project, nearly all of which originated outside of Nevada, exceeded "sixty-seventy million dollars."

[7] Two other firms, Kellex Corporation and Babcock and Wilcox, were also named in the amended complaint as employers at the Valmy jobsite, but reference to these two companies was deleted at the hearing. The General Counsel's attorney explained that when the original complaint issued (on July 9, 1979) the General Counsel was not aware which employer had called for the dispatch of an iron worker.

Power Company at a site along Route 80 about 200 miles north of Reno. He stated that PDM has the contract for fabrication and erection of the structural steel work, that Kellex Corporation has the contract to erect the stack, and that Babcock and Wilcox has "the large portion of work," including contracts for erecting the boiler, the turbine generator, the condenser, and steel for "on site conveyors and so forth." All of these firms, including Stone & Webster, has had occasion to use iron workers, he said, but the General Counsel's attorney stated that she intended to rely only on Respondent's failure or refusal to dispatch Butler to work for PDM. PDM, Cusick stated, has employed the largest number of iron workers and, in fact, had a "standing order" for such workmen during the summer 1979.

Cusick identified a number of exhibits, including General Counsel's Exhibit 6, the "Power Plant Project Agreement" for "North Valmy Station Units 1 & 2," which was signed by a Stone & Webster official (W. S. Mohn) and an official of the Building and Construction Trades Council of Northern Nevada on March 26, 1976. Among the unions which are signatory to the Power Plant Project, according to Cusick, is Local No. 118. Cusick stated that Stone & Webster and PDM entered into a separate Structural Steel contract which provides that the Power Plant Project Agreement is to be considered a part of such contract.

Cusick also identified, as General Counsel's Exhibit 7, the "National Agreement" between the International Association of Bridge, Structural and Ornamental Iron Workers and the National Constructors Association dated March 13, 1979. Stone & Webster is a signatory to the National Agreement and, said Cusick, all contractors and subcontractors on the Valmy project are required to become signatory to such agreement. According to Cusick, the Project Agreement, General Counsel's Exhibit 6, takes precedence over the National Agreement. He also added:

> To further confuse the issue there are local agreements that if it's not covered under the project agreement then the conditions as stipulated in the local conditions agreements, if one is not signatory to the national agreement.

Daniel Patrick Griffin, who had been the job superintendent for Pittsburgh Des Moines Steel Company at Valmy, said PDM first hired ironworkers on March 12, 1979. He indicated that the company had hired around 20 workers between May 29 and June 30. There were times in 1979, he said, when requests for ironworker jobs went unfilled. Griffin said the company placed all of its orders for ironworkers with Local 118 in Sacramento but that not all ironworkers came from that Local. He said the Valmy job was "borderline" between Salt Lake City and Sacramento and that Local 118 in Sacramento and Local 27 in Salt Lake City "split" the work. Griffin said ironworkers had come to the job from Minnesota, Arizona, Fresno, San Diego, as well as from Utah and Sacramento. Griffin, who is still a member of the Iron Workers Union, stated that locals fill requests for workers "all the time" by referring them to other locals.

Griffin testified that PDM is indirectly signatory to the agreement captioned "Iron Worker Employers, State of California & a Portion of Nevada . . . and District Council of Iron Workers of the State of California and Vicinity," General Counsel's Exhibit 14, through the Western Steel Council.

Time records on employees were kept at the Valmy jobsite as well as company offices in California. Employees were paid at the Valmy jobsite, he said. Grievances were handled either on a person-to-person basis at the jobsite or by long distance telephone (to Sacramento or Utah).

Griffin stated that the work at Valmy was "very boring" with the result that there was considerable turnover. The workers lived in bachelor quarters, and no meals were provided on the weekend.

William J. Butler, the alleged discriminatee, testified that he had been an ironworker for 30 years and a member of Local 118 since 1960. He said he had paid his regular dues and had been dispatched out of the Local's hiring hall until 1977 when he became delinquent in payment of supplemental dues. Butler identified an authorization card, General Counsel's Exhibit 17, which recites that the signor authorizes payment of "supplemental dues" to the District Council of Iron Workers of the State of California and Vicinity on or after July 1, 1977. He said he was asked to sign the card by Local No. 118's Business Manager Maxie Sturgis but refused to do so.[8]

In March 1978 Sturgis announced at the hiring hall that jobs were available at a "Diablo Canyon" project. Butler said he asked to be assigned to the project but that the office girl, "Pat," told him he could not go because he had not signed the supplemental dues card. He said Pat then placed a card in front of him and stated: "Maxie said, 'Sign that.'" Butler said he refused to sign the card but was assigned to the job anyway and worked there for a year, until March 1979.

Butler stated that he had seen two letters from the District Council of Iron Workers for the State of California and Vicinity dated January 1979 asking that he be dismissed unless he paid the Union's supplemental dues. He was told, however, when he was let go at the Diablo Canyon job, that he was being reduced in force.

In mid-March 1979 Butler went to Local 118 and put his name on the out-of-work list. "Every day" thereafter he said he went to the hiring hall. At first his name was at the bottom of the list but it moved up to the third or fourth position. According to Butler, on the morning of May 29, while he was standing at the dispatch window, Sturgis told him that he would not be dispatched "to the Valmy job or any other job until you pay your supplemental dues and sign the authorization card." Butler said he then told Sturgis that he should call Mr. Van Bourg, the Union's attorney, about the refusal to dispatch him. This prompted Sturgis to reply: "F— you and Van

[8] According to Butler, he and "a few others" had instituted a suit against the "whole district council" over the attempt to collect the supplemental dues. Butler also filed a grievance challenging the assessment of the supplemental dues, but it never went to arbitration.

Board" (sic).[9] At a later time Butler was told (by Cecil Lewis) that Sturgis had a job for him. Butler then spoke to Sturgis, who told him he could go to work "when you pay up."

On June 27 Butler wrote and delivered to Local 118 a check for $322.35 to cover payment of the supplemental dues. The check, General Counsel's Exhibit 17, bears a statement that reads: "Paid under Protest My Civel [sic] Rights are Being Violated." On the same day Butler went to work at the Valmy project and worked there until he reinjured his back on or about September 25.

Monroe Curtis Duff, a longtime member of Local 118, testified that he was in the hiring hall on May 29 when the Local's business manager, Maxi Sturgis, announced that some men were needed for a job in Valmy. Duff recalled that Butler went to the dispatch window at the time and heard Sturgis say to Butler that Butler would be sent to the job when Butler paid up his dues. Duff also testified that he was present later at the union hall on June 13 when Sturgis told Butler that Butler would go out on a job "when he paid up his supplementary dues." He said Butler then asked Duff about a loan for the dues and suggested that he could mortgage his house to pay them.[10]

Having carefully considered the record and the briefs filed, I find Respondent did not violate the Act as alleged.

The complaint alleges that Respondent violated the Act by refusing, or failing, to refer William James Butler, the Charging Party, to employment at the Valmy project because he "failed to pay dues when he was under no obligation to do so." The complaint indicates that the Respondent Union violated the Act because Butler was denied employment, contrary to Section 8 of the Act, "on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Butler was apparently[11] denied employment for a time (i.e., until June 27 when he submitted a check in the amount of $322.35 under protest) by Respondent because of his failure to pay dues to the Union. It is obvious from the record that this was the basis of the Charging Party's complaint, and it seems apparent that this was the theory of the General Counsel's written allegations.

But the General Counsel repudiated the basis of the complaint at the hearing. At the end of the hearing the General Counsel's attorney was asked whether the case turned on the legality of the supplemental dues. The response was, "No, absolutely not." Respondent's counsel also responded:

> No, we do not believe that the case turns on the legality of the supplemental dues. Our understanding of the prior conversations were that that was simply not an issue.

Further, the General Counsel states in his brief:

> General Counsel does not contend that Butler was not delinquent in paying supplemental dues, nor does General Counsel allege that the requirement to pay supplemental dues was unlawful.

The brief goes on:

> The theory supporting the charge in this case is that since the job with Pittsburgh Des Moines Steel was being performed under a different collective bargaining agreement from the agreement under which the delinquency occurred, Butler was entitled to a seven day grace period in which to pay up his delinquent dues before being separated from employment. Alternatively, General Counsel takes the position that sine the job situs was in Nevada, whose laws prohibit denial of employment based on nonmembership, state law prevails and the denial of employment to Butler was unlawful without respect to any period of grace.[1]

[1] Nevada has a prohibitory statute as distinguished from some right to work states which have regulatory statutes. See discussion.

The difficulty with Respondent's principal argument is that it is a theory not alleged in the complaint and not tried during the proceeding. It is apparent from the General Counsel's brief that his alternative argument seeks to put in issue Butler's employment at Diablo Canyon (by Guy F. Atkinson Company), in no way alluded to in the complaint, before any call was placed with the Union for workers at Valmy.

The General Counsel's alternative argument is also unpersuasive. It is hardly within the scope of the complaint as drafted, but assuming that the theory was tried,[12] the facts of record do not reveal a violation of law on the basis which the General Counsel argues.

It is true that Section 14(b) of the Act allows States to prohibit union-security agreements by enacting "right-to-work" laws.[13] Also, the State of Nevada has enacted a statutory provision that provides (sec. 613.250, G.C. Exh. 8):

> No person shall be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization, or shall the state, or any subdivision thereof or any corporation, individual or as-

[9] Butler said he then asked Sturgis whether the latter would return $323 in supplemental dues if Butler paid that amount at the time (in order to be dispatched) and later won the suit involving the legality of the Union's collection of such dues. Butler said Sturgis answered that he would not.

[10] Duff seemed pretty certain of the dates of these conversations, but he was not sure about the date of the first conversation when he gave a statement to the Board on October 30. He agreed on cross-examination that the October 30 statement made no reference to a June 13 conversation with Butler and that he was not sure whether Butler was serious that day about having to borrow money to pay the supplementary dues.

[11] But, as Respondent points out in its brief, it was not clearly established that Butler was eligible for dispatch prior to June 27.

[12] The General Counsel's attorney did indicate during the trial that she intended to rely on the fact that the State of Nevada, where the Valmy project was located, was a "right-to-work" state.

[13] Sec. 14(b) reads:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

> sociation of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of nonmembership in a labor organization.

Further, as the General Counsel points out, the Supreme Court has held in *Oil, Chemical & Atomic Workers International Union, AFL-CIO* v. *Mobil Oil Corp., etc.*, 426 U.S. 407 (1976), that it is "the employees' predominant job situs" which determines whether a state's right-to-work law would apply under Section 14(b) or not.

Undoubtedly the predominant job situs of employees employed on the Valmy project was Nevada and not California, from which they were dispatched. And, undoubtedly, under *Mobil Oil*, the Union would have violated the Act had it caused the *termination* of Butler's employment because of his failure to pay any union dues. But the General Counsel's cause is predicated on the failure or refusal of the Union to dispatch, not a termination. The Supreme Court in *Mobil Oil* clearly held that the Act, insofar as it relates to the application of Section 14(b) is concerned, focuses only on post-hiring conditions, not the hiring process. Said the Court (426 U.S. at 417):

> Section 14(b) simply mirrors that part of §8(a)(3) which focuses on *post*-hiring conditions of employment. As its language reflects, §14(b) was designed to make clear that §8(a)(3) left the States free to pursue "their own more restrictive policies in the matter of union-security agreements." *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U.S. 301, 314 (1949). Since §8(a)(3) already prohibits the closed shop, the more restrictive policies that §14(b) allows the States to enact relate not to the hiring process but rather to conditions that would come into effect only *after* an individual is hired. It is evident, then, that §14(b)'s primary concern is with state regulation of the *post*-hiring employer-employee-union relationship. And the center of the post-hiring relationship is the job situs, the place where the work that is the very *raison d'etre* of the relationship is performed.

CONCLUSIONS OF LAW

1. The Respondent, Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Stone & Webster Engineering Corporation and Pittsburgh Des Moines Steel Company are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent has not been shown to have violated the Act as alleged.

[Recommended Order for dismissal omitted from pubication.]